COPY

71-1519

Supreme Court, U. S.
FILED
MAY 20 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

CEICEL D. BROWN and WILLIAM D. BROWN,
Petitioners,

vs.

THOMAS P. SCOTT,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

AMY BURKETT
Route 3, Box 353
Biloxi, Mississippi 39532
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Motion for Lease to File Petition 1
Petition for Writ of Certiorari 2
Opinions Below 2
Jurisdiction 2
Questions Presented 2-3
Statutes, Federal Rules and Regulations Involved 3-6
Statement 7-9
Reasons for Granting Writ 10-23
Conclusion 24

Appendix—

Opinion, U.S. District Court for Western District of Arkansas A1-A11
Opinion, U.S. Court of Appeals for the 8th Circuit A12-A14
Order Denying Petition for Rehearing A14

Alphabetical Index of Statutes and Authorities

STATUTES AND RULES

Amendment V to Constitution of United States 3
28 U.S.C.A., Sec. 2072 3
28 U.S.C.A., Federal Rules of Civil Procedure 4-7
Rule 8(b, c, d, f) 4-5, 9, 10, 12, 13
Rule 9(c) 5, 10, 12, 13
Rule 12(b) 5-6, 10, 12, 13
Rule 56(d, e) 6

TEXTS

16 Am. Jur. 2d, Constitutional Law, Sec. 360 10
41 Am. Jur., Pleadings, Secs. 362, 364 13
41 Am. Jur., Pleadings, Sec. 366 14
41 Am. Jur., Pleadings, Sec. 368, pp. 543-545 22
16A Corpus Juris Secundum, Constitutional Law, Sec. 569 10
71 Corpus Juris Secundum, Pleading, Sec. 531, p. 1098 .. 22
2A Moore's Federal Practice, 2d Ed., Sec. 8.34, p. 1895 ..... 9, 14, A5
6 Moore's Federal Practice, 2d Ed., Sec. 56.04, p. 2057 11

CASES CITED

Anderson Nat. Bank v. *Luckett*, Ky., 64 S.Ct. 599, 321 U.S. 233, 88 L.Ed. 692, 151 A.L.R. 824 10
Blackhawk Heating & Plumbing Co. v. *Driver*, 433 F.2d 1137, 1145 ..... 11, 21
Bruce Construction Co. v. *U.S. for the Use of Westinghouse Elec. Supply Co.*, C.C.A. 5th 1957, 242 F.2d 873 21
Budd Co. v. *U. S.*, D.C. Pa. 1956, 19 F.R.D. 346 23
Engle v. *Aetna Life Ins. Co.*, C.C.A. 2d 1943, 139 F.2d 469 ..... 17, 21
Garrett v. *Louisville & N.R.Co.*, 235 U.S. 308, 59 L.Ed. 242, 35 S.Ct. 32, 33 19
Grabner v. *Willys Motors, Inc.*, C.A. Ore. 1960, 282 F.2d 644, 86 A.L.R. 2d 994, 998 21
Maloney v. *Brandt*, 123 F.2d 779 21
Maty v. *Grasselli Chemical Co.*, 1938, 303 U.S. 197, 200, 58 S.Ct. 507, 509, 82 L.Ed. 745, 748 ..... 9, 12, 14, 15, A5
Mesirow v. *Duggan*, C.C.A. 8th 1957, 240 F.2d 751, modified on other grounds 243 F.2d 100, certiorari denied 78 S.Ct. 93, 355 U.S. 864, 2 L.Ed.2d 70 21

Mullane v. *Hanover Bank & Trust Co.*, 339 U.S. 346, 70 S.Ct. 652, 657, 94 L.Ed. 865 10
New York Life Ins. Co. v. *Cooper*, C.C.A. 10th 1947, 167 F.2d 651 21
Richard v. *Credit Suisse*, 242 N.Y. 346, 350, 152 N.E. 110, 116 (1926) 11
Rich v. *Pappas*, C.C.A. Ky., 229 F.2d 308 21
Schlagenhauf v. *Holder*, 379 U.S. 104, 85 S.Ct. 234, 244 .. 20
Sibbach v. *Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 426, 427, 85 L.Ed. 479 ..... 15, 16, 20
John S. Sills & Sons v. *Bridgeton Condensed Milk Co.*, C.C.A. N.J., 43 F.2d 72 21
U. S. v. *Northern P.R.Co.*, 177 U.S. 435, 44 L.Ed. 836, 20 S.Ct. 706, 707 19
Weir v. *U. S.*, C.C.A. 8th 1962, 310 F.2d 149, 155-156 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

CEICEL D. BROWN and WILLIAM D. BROWN,
Petitioners,

vs.

THOMAS P. SCOTT,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully move this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 1254 of Title 28 of the United States Code, directed to the United States Court of Appeals for the Eighth Circuit.

AMY BURKETT
Route 3, Box 353
Biloxi, Mississippi 39532
Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Ceicel D. Brown and William D. Brown, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 28, 1972; petition for rehearing denied February 23, 1972.

OPINIONS BELOW

The opinion of the District Court for the Western District of Arkansas (R. pp. 106-114) is reported at 326 F.Supp. 332 (App. pp. A1-A11). The opinion of the Court of Appeals for the Eighth Circuit (Tr. pp. 1-4) is reported at 454 F.2d 693 (App. pp. A12-A14). The order denying petition for rehearing is set out at Appendix p. A14.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on January 28, 1972 (Tr. pp. 1-4), and copy thereof is appended to this petition in the Appendix at pages A12-A14; the order of the Court of Appeals for the Eighth Circuit denying petition for rehearing was made and entered on February 23, 1972 (Tr. p. 17), and copy thereof is appended to this petition in the Appendix at p. A14; the jurisdiction of the District Court is shown at p. 1 of its opinion (App. p. A1). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Whether the judgment in this case deprives petitioners of their property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States, and in violation of the

provisions of Rule 8(b, c, d), Rule 9(c), Rule 12(b) and Rule 56(d, e), Federal Rules of Civil Procedure.

2. Whether the District Court had authority under Rule 8(f), Federal Rules of Civil Procedure to ignore the plain, mandatory provisions of Rule 8(b, c, d), Rule 9(c) and Rule 12(b), Federal Rules of Civil Procedure.

3. Whether the District Court had authority to disregard or ignore the mandatory provisions of Rule 56(d, e), Federal Rules of Civil Procedure.

4. Whether the decision in the instant case is in conflict with applicable decisions of this Court.

5. Whether the decision in the instant case is in conflict with applicable decisions of Courts of Appeals of other circuits.

6. Has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Petitioners are informed and believe that this Court will not consider the merits of this case, or the sufficiency of the evidence to support the findings of the trial court, upon this petition, therefore that question is not presented here.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Amendment V to the Constitution of the United States

> "No person shall be * * * deprived of life, liberty, or property, without due process of law: * * *"

28 U.S.C.A., Sec. 2072, Rules of Civil Procedure

> "The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, plead-

ings, and motions, and the practice and procedure of the district courts of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Courts of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers."

28 U.S.C.A., Rules of Civil Procedure for the United States District Courts

Rule 8. *General Rules of Pleading.*

"(a) * * *

(b) *Defenses; Form of Denials.* A party *shall* state in short and plain terms his defenses to each claim asserted and *shall* admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials *shall* fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments, or paragraphs, or he may generally deny all the averments except such averments or paragraphs as he expressly admits; but when he does so intend to controvert all the averments, including grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party *shall* set forth affirmatively accord and satisfaction, * * * and any other matter constituting an avoidance or affirmative defense. * * *

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. * * * * * *

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice." (Emphasis ours).

Rule 9. *Pleading Special Matters.*
"* * *

(c) *Conditions Precedent.* * * * A denial of performance or *occurrence shall be made specifically and with particularity.* * * *" (Emphasis ours).

Rule 12. *Defenses and Objections—When and How Presented.*
"* * *

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, *shall* be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule

19. A motion making any of these defenses shall be made before pleading, if a further pleading is permitted. * * *" (Emphasis ours).

Rule 56. *Summary Judgment.*

* * *

"(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defenses Required.* * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, *must* set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. * * *" (Emphasis ours).

STATEMENT

Petitioners brought suit in the District Court for the Western District of Arkansas, alleging diversity of citizenship and amount involved as grounds for jurisdiction, to recover judgment against Respondent for money lent, alleging:

> "2. Defendant owes plaintiffs Thirty-three Thousand Nine Hundred Ninety-five and 91/100 Dollars ($33,995.91) for money lent by plaintiffs' legator, David A. Burkett, to defendant on the following dates:
>
> | | |
> |---|---|
> | Count 1: Money lent on *May 5, 1969 | $15,000.00 |
> | Upon which defendant has paid | 451.00 |
> | Leaving balance owed | $14,549.00 |
> | Count 2: Money lent on August 26, 1969 | 19,446.91 |
> | Total | $33,995.91" |

(R. pp. 1-2)

Respondent filed motion to dismiss, under provisions of Rule 12(b), F.R.C.P., upon grounds 1, 6 and 7 (R. pp. 2-3). This motion being overruled (R. pp. 2-4), he then filed answer as follows:

> "Comes now the defendant, Thomas P. Scott, and for his answer to the plaintiffs' complaint, states:
>
> 1. That the defendant denies that he is in any way indebted to the plaintiffs.

*In the trial court's opinion this is stated as "March 5, 1969"; apparently a typographical error.

2. That the defendant denies that he is in any way indebted to the plaintiffs' legator, David A. Burkett.

3. That the defendant admits that he is a citizen of Springdale, Washington County, Arkansas.

WHEREFORE, the defendant prays that the plaintiffs' complaint be dismissed, for his costs herein expended and all other proper relief." (R. pp. 6-7)

Petitioners filed motion for summary judgment under Rule 56, F.R.C.P. (R. p. 10), which motion was overruled by the District Court the day after it was filed, without requiring or even waiting for the respondent to comply with the provisions of Rule 56(e), as set out supra, without any hearing and without complying with Rule 56(d), or in any way indicating what facts appeared without controversy, merely stating: "* * * the court is unable to determine from the record that there is no genuine issue as to any material fact." (R. pp. 10-12).

Thereafter the case was set for pretrial conference, but, seven days before the date set, this conference was cancelled by the District Court (R. pp. 13-15).

At the trial Petitioners made opening statement, but Respondent declined to do so (R. p. 21). Petitioners proved by competent evidence that the moneys were delivered by Burkett to Respondent on the dates and in the amounts alleged, that Burkett's ledger showed payments thereon by respondent in the amount alleged, that Burkett was not indebted to respondent on either of the dates involved and that payment had not been made by respondent (R. pp. 21-46, Pl. Ex. 1-20; R. pp. 15-19). At the close of petitioners' case, respondent moved to dismiss for failure to prove, which motion was overruled (R. p. 46).

Whereupon, still without making any statement as to what his defense would be, respondent, over the objection of petitioners, as a complete surprise to them, without any notice whatever and without giving them any opportunity to prepare to meet such a defense, was permitted to offer, and prevail upon, the affirmative defense of "gift". While respondent testified that Burkett had given him $15,000.00 in the early part of May, and a substantial amount in the latter part of August, he did not give the date of either of said asserted gifts, or the amount of the second one; neither did he ever deny that the loans were made as alleged; nor did he ever identify the cashier's check and two bank money orders offered in evidence by petitioners as the instruments by which the loans were made as the instruments by which the asserted gifts were made (R. pp. 46-91).

At the request of the court, the case was submitted on briefs, without oral argument, and thereafter the District Court rendered its opinion holding that petitioners' contentions that "Defendant not having denied that the money was lent, that allegation is admitted," and "having failed to plead any matter constituting an avoidance or affirmative defense any such defense is waived" were without merit (App. p. A5), under the liberal construction of pleadings required by Rule 8(f) F.R.C.P. and the decision of this Court in *Maty* v. *Grasselli Chemical Co.*, (1938) 303 U.S. 197, 200, 58 S.Ct. 507, 509, 82 L.Ed. 745, 748, as quoted in 2A Moore's Federal Practice, 2d Ed., Sec. 8.34, p. 1895 (App. p. A5); that respondent's evidence showed that the sums allegedly lent were gifts, and dismissed petitioners' complaint (App. pp. A5-A11).

This decision of the District Court was affirmed by the Court of Appeals for the 8th Circuit (App. pp. A12-A14).

REASONS FOR GRANTING THE WRIT

I.

The decision below should be reviewed because it erroneously deprives petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. The first, essential, fundamental requirement of due process is *NOTICE*. (16 Am. Jur. 2d, Constitutional Law, Sec. 360; 16A C.J.S., Constitutional Law, Sec. 569; *Mullane* v. *Hanover Bank & Trust Co.*, 339 U.S. 346, 70 S.Ct. 652, 657, 94 L.Ed. 865; *Anderson Nat. Bank* v. *Luckett*, Ky., 64 S.Ct. 599, 321 U.S. 233, 88 L.Ed. 692, 151 A.L.R. 824, and the many cases cited by this Court in the above cases and by Am. Jur. 2d and C.J.S.). Rule 8(b), F.R.C.P., provides: *"A party shall state in short and plain terms his defenses to the claim asserted * * *"*; Rule 8(c) requires that he *"* * * shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense * * *"*; Rule 9(c) provides: *"* * * A denial of performance or occurrence shall be made specifically and with particularity"*; and Rule 12(b) provides: *"Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto * * *"*; but, in the instant case, in response to the allegation in petitioners' complaint that defendant is indebted to them for money lent to him by their legator (R. pp. 1-2), the defendant (respondent) merely says: *"Defendant denies that he is in any way indebted to the plaintiffs."* (R. pp. 6-7).

As Judge, later Justice, Cardozo has stated:

> "The very object of a motion for summary judgment is to separate what is formal and pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the

burden of a trial." *Richard* v. *Credit Suisse,* 242 N.Y. 346, 350, 152 N.E. 110, 116 (1926).

Quoted in *Blackhawk Heating & Plumbing Co.* v. *Driver,* 433 F.2d 1137, 1145 (1970), and
6 Moore's Federal Practice, 2d Ed., Sec. 56.04, p. 2057.

With that object in view, petitioners filed motion for summary judgment (R. pp. 9-10), but the District Court, ignoring the plain mandatory provisions of Rule 56, F.R. C.P., overruled that motion the day after it was filed, without any hearing whatever and without requiring, or even waiting for the defendant to state any facts as required by subdivision (e), and without stating what facts were not controverted and what were controverted, simply saying: "* * * *The Court is unable to determine from the record that there is no genuine issue as to any material fact.*" (R. pp. 10-12). Leaving petitioners still confronted by the bare statement, "Defendant denies that he is in any way indebted to the plaintiffs" (R. p. 7), and without any information or notice whatever, not the least inkling, as to what defense, if any, they would be called upon to meet.

Upon this record, the District Court, over the objection of petitioners (R. pp. 61-62), permitted the respondent to present the affirmative defense of gift (R. pp. 42-71), without any notice whatever to petitioners of such defense, not even an opening statement at the trial (R. p. 21), and without giving petitioners any opportunity to prepare to meet such defense. And, although the respondent did not, in his testimony, deny that the loans were made as alleged, or identify the cashier's check (Pl. Ex. 17), or the two bank money orders (Pl. Ex. 6 & 8) as the instruments by which the alleged loans were made, as the instruments by which the alleged gifts were made (R. pp.

42-71), upon respondent's evidence held that the moneys involved were not loans but were gifts to the respondent, and dismissed petitioners' complaint (R. pp. 105-114, App. pp. A1-A11). This judgment of the District Court was affirmed by the Circuit Court of Appeals. (App. pp. A12-A14).

Petitioners respectfully submit that this judgment deprives them of their property without due process of law and should be reviewed by this Court.

II.

The decision below should be reviewed by this Court for the further reason that it erroneously interprets Rule 8(f), Federal Rules of Civil Procedure, so as to render meaningless the provisions of Rule 8(b, c, d), Rule 9(c) and Rule 12(b), Federal Rules of Civil Procedure; misinterprets the decision of this Court in *Maty* v. *Grasselli Chemical Co.*, (1938) 303 U.S. 197, 200, 58 S.Ct. 507, 509, 82 L.Ed. 745, 748; and is in conflict with the generally recognized and the often quoted purpose of the rules *"to prevent surprise and inform the adverse party of the issues he must be prepared to meet."*

Neither the District Court nor the Court of Appeals give us any indication as to by what process of reasoning or deduction the simple statement, *"Defendant denies that he is in any way indebted to plaintiffs"* can be construed as a denial of the averments of the complaint that the money was lent and payments made thereon, as required by Rule 8(b) and Rule 9(c). There might have been a number of reasons why defendant was not indebted to plaintiffs, though the money was loaned as alleged, Rule 8(c) suggests several of them. Nor do they give any indication as to how that statement can be construed as fairly meeting the substance of the averments of the complaint, as required by Rule 8(b), or as setting forth af-

firmatively the defense of "gift" as required by Rule 8(c); or of Rule 9(c) that "Denial of performance or occurrence shall be made specifically and with particularity"; or as meeting the requirement of Rule 12(b) that "Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto * * *"; nor how that statement can be construed as giving the plaintiffs any notice whatever of any defense they would be required to meet.

41 American Jurisprudence, *Pleadings*, Sec. 362:

> "* * * The rule requiring proper issues to be formed by the pleadings is a sound and salutary one, for all parties in the case should be advised in advance as to what the issues are. Without issues there can be no proper disposition of the case. * * *"

> Sec. 364. "* * * nothing is open and competent to be proved except what is comprehended in the distinct averments and denials of the parties, * * * A statement of special grounds of defense which gives the plaintiff no more notice of the defense relied on than would a plea of nonassumpsit is not sufficient to admit proof of such defenses, where the statute requires a statement of the grounds of defense sufficient to give the plaintiff notice of their character. * * *"

The answer in this case could not be construed as a general denial. Defendant had previously questioned the sufficiency of the complaint by motion upon grounds 1, 6 and 7, as provided by Rule 12(c) (R. pp. 2-4), and the answer admits that defendant "is a citizen of Springdale, Washington County, Arkansas", which is one of the allegations in plaintiffs' statement of grounds of the court's jurisdiction. But, even if it could be so construed, an affirmative defense could not be shown under it.

41 American Jurisprudence, *Pleading*, Sec. 366, p. 542:

> "* * * The defense set up by the defendant under his general denial must be consistent with it. He cannot be allowed to introduce matters of defense inconsistent with such denial, as, for example, a tender of payment. Matter which must be specially pleaded cannot be shown under a general denial, hence, affirmative defenses are not available under it. * * *"

In passing upon plaintiffs' objections to the sufficiency of the answer, the District Court simply dismisses them with the statement they are "without merit", quotes Rule 8(f) and 2A Moore's Federal Practice, 2d Ed., Sec. 8.34, p. 1895, and cites *Maty* v. *Grasselli Chemical Co.*, supra (App. p. A5). Upon that point the Court of Appeals simply says "We agree" (App. pp. A12-A13).

2A Moore's Federal Practice, 2d Ed., supra, quotes from the opinion of this Court in *Maty* v. *Grasselli Chemical Co.*, supra. In that case this Court said:

> (p. 508) "The sole question is: Did the New Jersey Statute of limitations of two years bar the amendment because it set out a new cause of action?"

After discussing the facts and quoting the New Jersey Court of Errors and Appeals' rule applying the operating of that statute, this Court said:

> (p. 509) "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, the same injury

and the same negligence. *Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment.* The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action." (Emphasis ours).

The construction placed upon the answer in the instant case could not, and did not, "accomplish the end of a just judgment", as it deprived plaintiffs of the notice of the defense relied upon by the defendant, and deprived them of the opportunity to prepare to meet that defense to which they were entitled under the law.

As stated supra, the District Court, over the objections of plaintiffs, permitted the defendant to offer, and prevail upon, the affirmative defense of "gift" (R. pp. 42-71, App. pp. A1-A11), as a complete surprise to plaintiffs, without any notice whatever, and without giving them an opportunity to prepare to meet that defense, and the Court of Appeals affirmed that judgment without comment (App. pp. A12-A14). There is absolutely nothing in the defendant's answer, or anywhere in this record, even slightly indicating that such a defense would be relied upon. Petitioners respectfully submit that the courts below have misinterpreted the decision of this Court in *Maty* v. *Grasselli Chemical Co.*, supra.

To paraphrase the language of this Court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 426, 85 L.Ed. 479: In the instant case we have three Federal Rules of Civil Procedure which have the force of federal statutes, and neither the *Maty* v. *Grasselli Chemical Co.* case, nor Rule 8(f), Federal Rules of Civil Procedure is authority for ignoring them.

III.

The decision below should be reviewed by this Court for the further reason that the District Court, in overruling plaintiffs' motion for summary judgment, misinterpreted or disregarded the plain mandatory provisions of Rule 56, Federal Rules of Civil Procedure, and thereby deprived plaintiffs of the information and protection they were entitled to receive and defeated the object and purpose of that motion. We have discussed this matter at some length under Point I, supra, but wish to again call the Court's attention to the fact the provisions of this rule are mandatory, and the District Court had no authority to ignore them. *Sibbach* v. *Wilson & Co.*, supra.

The notes of the Advisory Committee on Rules on the amendment of Subdivision (e) of this rule in 1963 are particularly pertinent here. There the Committee said:

> "The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. (stating a typical case and citing cases) * *
>
> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d Ed. 1953); 3 Barron & Holtzoff, supra, Sec. 1235.1.
>
> "It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

"The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary."

Engle v. *Aetna Life Ins. Co.*, C.C.A. 2d 1943, 139 F.2d 469, 472-473. There the Court said:

"(5, 6) But the matter is sufficiently important so that we should go beyond the bare words of the summary-judgment rule to the reasons behind it. The federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants and in all forms and kinds of civil actions. But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.' 3 Moore's Federal Practice 3175. In New York the question of constitutionality was settled by considering the procedure as one to determine whether a defense or issue formally stated between the parties was merely sham and not bona fide. Formerly this could be determined only on the face of the pleadings; the only essentially new step was to allow such a showing to be made on the basis of detailed affidavits. The rationale is well stated in one of the leading cases establishing constitutionality: Hanna v. Mitchell, 202 App. Div. 504, 518, 196 N.Y.S. 43, 55, affirmed 235 N.Y. 534, 139 N.E. 724: 'To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although

the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance.' Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insuf ficient to prevent the award of summary judgment. See, for example, Shotkin v. Mutual Benefit Health & Accident Ass'n, 2 Cir., 138 F.2d 531; Altman v. Curtis-Wright Corp., 2 Cir., 124 F.2d 177, 180; Milcor Steel Co. v. George A. Fuller Co., 2 Cir., 122 F.2d 292, affirmed 316 U.S. 143, 62 S.Ct. 969, 86 L.Ed. 1332; Bushwick-Decatur Motors v. Ford Motor Co., 2 Cir., 116 F.2d 675; Banco de Espana v. Federal Reserve Bank of New York, 2 Cir., 114 F.2d 438, 445; Piantadosi v. Loew's, Inc., 9 Cir., 137 F.2d 534; Board of Public Instruction v. Meredith, 5 Cir., 119 F.2d 712, certiorari denied 314 U.S. 656, 62 S.Ct. 109, 86 L.Ed. 526.

"In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back, to controvert the legal deduction from the New York statute and decisions that the conceded misrepresentations of the application are material. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any of the applicable decisions."

In addition to the cases cited by the Court in the above quotation, Shepard's Citations lists fifty-three cases where this case has been cited on this point.

Petitioners respectfully submit that the ruling in the instant case is incompatible with the basic purpose of the rule and should, therefore, be reviewed by this Court.

IV.

The decision below should be reviewed by this Court for the further reason that it is in conflict with the following applicable decision of this Court, to wit:

United States v. *Northern P.R. Co.*, 177 U.S. 435, 44 L.Ed. 836, 20 S.Ct. 706, 707. There this Court said:

> "* * * It is a general rule that questions that are not within the pleadings may not be determined by the courts. * * * Courts have no jurisdiction to consider or determine the question of the forfeiture of a railroad grant until it is raised by direct allegations in a suit instituted by lawful authority for the express purpose of presenting it. (95 Fed. Rep. 879, 37 C.C.A. 305)".

Garrett v. *Louisville & N.R. Co.*, 235 U.S. 308, 59 L.Ed. 242, 35 S.Ct. 32, 33:

> "* * * Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, * * * Every bill must contain in itself sufficient matters of fact, per se, to maintain the plaintiff's case; and if the proofs go to matters not set up therein the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. Harrison v. Nixon, 9 Pet. 483, 503, 9 L.Ed. 201, 208; Dan. Ch.Pl. & Pr. 368."

Sibbach v. *Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 426, 427, 85 L.Ed. 479. This case called for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for District Court; the particular question involved was the refusal of the plaintiff to comply with an order of the District Court to submit to physical examination. There this Court said:

> (p. 426) "In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the Botsford nor the Stetson case is authority for ignoring it.
>
> * * *
>
> (p. 427) "(6) The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it. Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. * * * For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion."

Schlagenhauf v. *Holder*, 379 U.S. 104, 85 S.Ct. 234, 244 (1964). This case also involved construction of Rule 35 of the Rules of Civil Procedure, and cites *Sibbach* v. *Wilson & Co.*, supra. There the Court said:

> "(19-21) The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. * * *"

V.

Petitioners respectfully submit that the decision in the instant case is in conflict with the following applicable decisions of Courts of Appeals of other circuits, and should, therefore, be reviewed by this Court:

District of Columbia—*Blackhawk Heating & Plumbing Co.* v. *Driver*, 433 F.2d 1137 (1970), supra.

Second District—*Engle* v. *Aetna Life Ins. Co.*, C.C.A. 2d 1943, 139 F.2d 469, supra.

Third District—*John S. Sills & Sons* v. *Bridgeton Condensed Milk Co.*, C.C.A. N.J., 43 F.2d 72.

Fifth District—*Bruce Construction Co.* v. *U. S. for the Use of Westinghouse Elec. Supply Co.*, C.C.A. 5th 1957, 242 F.2d 873.

Sixth District—*Rich* v. *Pappas*, C.C.A. Ky., 229 F.2d 308.

Seventh District—*Maloney* v. *Brandt*, 123 F.2d 779.

Ninth District—*Grabner* v. *Willys Motors, Inc.*, C.A. Ore. 1960, 282 F.2d 644, 86 A.L.R. 2d 994, 998.

Tenth District—*New York Life Ins. Co.* v. *Cooper*, C.C.A. 10th 1947, 167 F.2d 651.

It is also in conflict with other applicable decisions of the Court of Appeals for the Eighth Circuit, to wit:

Mesirow v. *Duggan*, C.C.A. 8th 1957, 240 F.2d 751, modified on other grounds 243 F.2d 100, certiorari denied 78 S.Ct. 93, 355 U.S. 864, 2 L.Ed.2d 70.

Weir v. *U. S.*, C.C.A. 8th 1962, 310 F.2d 149, 155-156.

VI.

Has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision? Petitioners respectfully submit that it has, and for that reason this decision should be reviewed by this Court.

The accepted and usual course of judicial proceedings with reference to proof without pleading is well stated in

71 Corpus Juris Secundum, *Pleading,* Sec. 531, p. 1098, as follows:

> "Since a party must succeed, if at all, on the case, claim, or defense set up in the pleadings, regardless of what is disclosed or established by the evidence, proofs, in order to be effectual, must correspond substantially with the allegations of the pleadings. This is true under the codes as well as under the old system of pleading. *Proof without allegation is as unavailing as allegation without proof,* since, in order to make a case or to entitle a party to relief, *both must be present.*" (Emphasis ours).

Citing many Federal cases and cases from most of the State Courts.

41 American Jurisprudence, *Pleading,* Sec. 368, pp. 543-545, upon this point says:

> "Each party to a legal proceeding must allege every material fact essential to the statement of a cause of action in his favor against the defendant or to the statement of a good and sufficient defense, as the case may be, * * * While the party should be permitted to prove every fact alleged by him, not inconsistent with admissions express or implied, ordi-

narily, he will be precluded from proving any fact not alleged, for however full and convincing may be the proof as to any essential fact, that alone is insufficient unless the fact is averred. The reason for the rule is that the opposite party shall be specifically advised of what he is called upon to answer, so that he may be enabled to properly make out his case, and that he may not be taken by surprise in the testimony at the trial, *for proof without allegation is as impotent as allegation without proof.* * * * (Emphasis ours).

"A defendant, as already stated, must plead matters relied on as an affirmative defense or his proof relating thereto will not be admitted. * * *"

Citing many of the cases cited by Corpus Juris Secundum, supra.

Budd Co. v. *U. S.*, D.C. Pa. 1956, 19 F.R.D. 346. This was a suit for refund of income taxes, involving several million dollars, and, while it is a District Court decision, it is frequently quoted and followed. There the Court said:

"(1-3) The first amended answer states that the allegations contained in the refund claim 'are specifically denied' and that the allegations contained in paragraph 7 of the complaint 'are denied'. Such denials are not sufficient to comply with the terms of F.R.Civ.P. 8(b), 28 U.S.C.A., which provides: (Quoting Rule 8(b) as quoted supra) * * * It is well recognized that the above-mentioned rule requires the defendant to give the plaintiff notice of the defenses which it shall be called upon to meet. * * *"

CONCLUSION

For the foregoing reasons, because the actions of the courts below are plain error of such fundamental nature, and the principles involved are of such importance to the public, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

AMY BURKETT
Route 3, Box 353
Biloxi, Mississippi 39532
Counsel for Petitioners

PROOF OF SERVICE

I, Amy Burkett, the attorney of record for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of May, 1972, I served copies of the foregoing Petition for Writ of Certiorari on Thomas P. Scott, the only Respondent and only other party interested herein, by mailing to Hon. Carlos B. Hill, his attorney of record, at his usual business address No. 14½ East Center, Fayetteville, Arkansas 72701, by United States Air Mail, postage fully prepaid.

Witness my signature this the 19th day of May, 1972.

AMY BURKETT
Route 3, Box 353
Biloxi, Mississippi 39532
Counsel for Petitioners

Ceicel D. BROWN and William D. Brown,
Plaintiffs,

v.

Thomas P. SCOTT, Defendant.

No. F-70-C-21.

United States District Court,
W. D. Arkansas,
Fayetteville Division.
May 12, 1971.

Suit to recover sums allegedly lent by plaintiffs' legator to defendant. The District Court, John E. Miller, Senior District Judge, held that evidence established that sums were in fact, gifts which had been duly accepted.

Complaint dismissed.

1. Federal Civil Procedure (Key) 745, 759

In action for sums allegedly lent to defendant by plaintiffs' legator, failure of defendant to deny that the money had been lent did not constitute an admission of that allegation and failure of defendant to plead any matter constituting an avoidance or affirmative defense did not constitute waiver of such defense, especially where defendant in his answer, had denied that he was in any way indebted to plaintiffs or had been indebted to plaintiffs' legator. Fed.Rules Civ. Proc. rules 8(f), 52, 28 U.S. C.A.

2. Gifts (Key) 49(5)

In suit for sums allegedly lent by plaintiffs' legator to defendant, evidence established that the sums were gifts which had been duly accepted.

Miss Amy Burkett, Biloxi, Miss., David R. Boatright, Ft. Smith, Ark., for plaintiffs.

Crouch, Blair, Cypert & Waters, Carlos B. Hill, Fayetteville, Ark., for defendant.

OPINION

JOHN E. MILLER, Senior District Judge.

On August 10, 1970, plaintiffs commenced this suit to recover judgment against defendant in the sum of $33,995.91, and alleged:

> "2. Defendant owes plaintiffs Thirty-three Thousand, Nine Hundred Ninety-five and 91/100 Dollars ($33,995.91) for money lent by plaintiffs' legator, David A. Burkett, to defendant on the following dates:
>
> | | |
> |---|---|
> | "Count 1: Money lent on *March 5, 1969 | $15,000.00 |
> | Upon which defendant has paid | 451.00 |
> | Leaving balanced owed | $14,549.00 |
> | "Count 2: Money lent on August 26, 1969 | $19,446.91 |
> | Total | $33,995.91" |

On October 29, 1970, the defendant filed his answer, in which he denied that he is in any way indebted to the plaintiffs and further denied that he was in any way indebted to plaintiffs' legator, David A. Burkett.

The plaintiff Ceicel D. Brown is a citizen and resident of the State of Louisiana, and plaintiff William D. Brown is a citizen and resident of the State of Mississippi. The defendant Scott is a citizen of Arkansas and resides in the Western District. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs. Thus,

*NOTE: (Correct date is May 5, 1969, this is apparently a typographical error.)

jurisdiction is established by diversity and the amount in controversy, 28 U.S.C. § 1332.

David A. Burkett, prior to his death on September 24, 1969, was a citizen of Arkansas and resided in the City of Springdale, Arkansas. On January 9, 1969, he duly executed a last will and testament in which he directed that his executor pay all of his just and lawful debts. In paragraph 2 he stated that, not having any descendants, he gave, devised and bequeathed to William S. Horton of McAlester, Oklahoma, an undivided one-third interest in and to certain real property in the County of Pittsburg, Oklahoma. Paragraph 3 of the will reads as follows:

> "All the rest, residue and remainder of my property, real, personal or mixed, wherever situate and of whatsoever character, I devise and bequeath unto my nephews, Ceicel D. Brown of Shreveport, Louisiana, and William D. Brown of Biloxi, Mississippi, share and share alike; that if either of them be deceased, to the heirs of their body per stirpes."

In paragraph 4 he stated that in making the devises and bequests, he was not unmindful of his sisters, Amy Burkett and Georgia Krieger, each of Biloxi, Mississippi, nor of any of his other relatives whether specifically mentioned or not. In paragraph 5 he appointed the First State Bank of Springdale, Arkansas, as executor of the will.

On March 30, 1970, the executor filed an inventory showing a total value of personal property to be $37,569.91. On July 16, 1970, the Probate Court of Benton County, Arkansas, upon petition of the executor, entered a final order of distribution, which directed that the cash on hand, household goods and contents of a lock box be turned over to Ceicel D. Brown and William D. Brown and be divided equally between them. The order further provided that all

instruments pertaining to "the two choses in action should be turned over to the legatees named in the will." The assignment by the executor referred to the two choses in action as:

> "1—an account for $15,000.00, evidenced by one ledger sheet in the books kept in the regular course of business by David A. Burkett, the said ledger sheet showing that the $15,000.00 was loaned on May 5, 1969, by the said David A. Burkett to Tom Scott, and was repayable at the rate of $200.00 per month; that the $200.00 per month included interest at 6% per annum, and on which account three payments of $200.00 were made by Tom Scott, leaving a balance due at the time of the death of David A. Burkett of $14,549.00
>
> "1—against the said Tom Scott evidenced by two cashier's checks; one drawn by D. A. Burkett on his account of savings in the First National Bank of Springdale, Arkansas, in the amount of $9,373.33, and the other drawn by D. A. Burkett on his account of savings in the First State Bank, Springdale, Arkansas, in the amount of $10,073.58, both of which were evidenced by cashier's checks which were endorsed by Burkett and cashed by Tom Scott, on or about August 26, 1969, and the total of these 2 cashier's checks endorsed by Tom Scott amounted to ..... $19,446.91."

The cause was tried to the court on March 30, 1971, and at the conclusion of the testimony the parties were directed to submit briefs which have been received and considered, along with all the exhibits.

Plaintiffs make three basic contentions. First, they argue that "under the law and the evidence, they have

proved their case, not only by a preponderance of the evidence but beyond a reasonable doubt." Secondly, that "defendant not having denied that the money was lent, that allegation is admitted, and having failed to plead any matter constituting an avoidance or affirmative defense any such defense is waived." Thirdly, that "even if permitted to assert the affirmative defense of gift, defendant has failed to prove the alleged gifts."

[1] Since the second contention deals with a procedural question, the court feels that it should be considered separately from the other contentions and disposed of first. This contention is clearly without merit.

Rule 8(f), Fed.R.Civ.P., provides:

> "All pleadings shall be so construed as to do substantial justice."

Professor Moore, in 2A Moore's Federal Practice, 2d Ed., ¶ 8.34, p. 1895, states:

> "This mandate is the heart of the rules on pleadings. Its meaning is well stated in a Supreme Court decision handed down just after the Federal Rules had been submitted to Congress. Mr. Justice Black spoke for a unanimous Court: 'Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end.' "

See, Maty v. Grasselli Chemical Co. (1938), 303 U.S. 197, 200, 58 S.Ct. 507, 509, 82 L.Ed. 745, 748.

In addition to this, the defendant denied that he is in any way indebted to plaintiffs or indebted to the plaintiffs' legator, David A. Burkett, in his answer to plaintiffs' complaint.

In considering and determining the first and third contentions of plaintiffs, it is necessary to refer to the facts as established by the pleadings, interrogatories and answers thereto, together with the requests for admissions and the responses thereto.

The following shall constitute the court's finds of fact and conclusions of law as contemplated by Rule 52, Fed. R.Civ.P.

The deceased, D. A. Burkett, was a retired civil engineer and a close friend of defendant, Thomas P. Scott, and his wife, Louise. Burkett became acquainted with the Scotts during 1964 when Mrs. Burkett began patronizing the beauty shop operated by Mr. and Mrs. Scott. Later Mrs. Burkett became ill, was placed in a nursing home, and subsequently died in May of 1968. During Mrs. Burkett's illness and after her death, Burkett and the Scotts became close friends and associates. During this time Burkett rented an apartment from the Scotts which was in close proximity to their place of business. The defendant Scott and Burkett made numerous fishing trips together, and Burkett spent a considerable amount of time with the Scott family. Later, during 1968, Burkett moved from his apartment and took up residence nearer Beaver Lake. He shortly returned to Springdale and rented a duplex across the street from the Scott residence. Sometime toward the end of 1968 Burkett moved into a house trailer when the duplex became no longer available. The Scotts were at this time contemplating construction of a new house. It was decided that an addition to the house which was planned would be constructed for Burkett to live in.

Burkett did not get along well with any of his relatives. The plaintiff William D. Brown is a nephew of

Burkett, and was present at the trial but did not testify as to any family relationship. The feelings of the deceased, Burkett, toward his family were expressed to Carlos Hill, his attorney, when Mr. Hill was drafting a will for Burkett. Burkett told Mr. Hill that he wanted to provide for William Horton, his brother-in-law, to receive the interest owned by Burkett in some real property in Oklahoma. Burkett further stated that he planned to dispose of his assets prior to his death. Only at the insistence of Mr. Hill were the names of his two nephews, plaintiffs in this action, placed in the will. The names were placed in the will for the sole reason that Mr. Hill, as attorney for Burkett, felt that some residuary legatee should be named. This will was revoked prior to the death of Burkett by the will in evidence as plaintiffs' Exhibit 1.

At some time after the death of his wife but before moving to the trailer park, Mr. Burkett made a trip to Mississippi for the purpose of deciding whether or not to reside with his two sisters there. After a short period of time he returned to Springdale and stated that he had very little desire to remain in their company.

On May 5, 1969, Burkett made a $15,000 withdrawal from his savings account in the First National Bank of Springdale, Arkansas. A bank money order from the First National Bank was issued to Thomas Scott in the amount of $15,000. It was endorsed by Scott and deposited into a savings account in the First National Bank of Springdale, Arkansas, on May 5, 1969. The savings account is in the name of Thomas P. Scott for Dana and Dinia Scott, the adopted children of Mr. and Mrs. Scott. Mr. Burkett delivered the check to Scott at his place of business in the presence of Mrs. Scott.

On August 26, 1969, Mr. Burkett withdrew the remaining $9,373.33 from his savings account at the First National Bank of Springdale, Arkansas, and obtained a bank money order from said bank made payable to D. A. Burkett. Also, on the same date, he withdrew $10,073.58 from a savings account in the First State Bank of Springdale, Arkansas, and obtained a cashier's check payable to D. A. Burkett. On the same day Burkett went to the defendant Scott's place of business and in the presence of Larry Stevens, a friend of Scotts who had formerly dated Scott's daughter, endorsed these two checks which totaled $19,446.91. He then delivered the checks to the defendant Scott, who deposited them into the savings account which he maintained for his children in the First National Bank of Springdale, Arkansas. Mr. Burkett stated to his neighbor, *Oscar B. Roy, that he had loaned a friend money to build a house, but no records or any other evidence to substantiate this were introduced.*

No evidence was offered by the plaintiffs as to the nature of the transaction involving the $19,446.91. There is only the allegation in plaintiffs' complaint stating that the money which changed hands between Burkett and Scott was a loan. On the 23rd of September, 1969, Mr. Burkett was injured in an explosion which destroyed his trailer, and on September 24, 1969, he died as a result of these injuries.

> In 58 C.J.S. Money Lent § 7a at page 881, it is stated: "In actions for money lent, as in other actions, plaintiff bears the burden of establishing by a fair preponderance of evidence every disputed fact that constitutes an element of his right to recover, including the loan, the maturity thereof, and the contract for repayment. • • • *Plaintiff is not relieved of the burden of proving that the transaction in question was a loan merely*

because defendant, instead of simply denying the loan, alleges that it was a gift." (Emphasis supplied.)

The issue before the court requiring further consideration is the transaction involving the alleged loan in the amount of $15,000 to Thomas P. Scott. After Burkett's death a ledger sheet and a sheet of paper containing some computations, plaintiffs' Exhibits 14 and 15, were found by the executor of the estate in a small locked box which was inside Burkett's trailer. On its face, the document reflects a loan to "Tommie Scott" in the amount of $15,000 on May 5, 1969, and that three payments of $200.00 each were made on June 5, July 5, and August 11, 1969. The computation shows the interest on $15,000 at 6 percent per annum. It also reflects the interest on this amount after payments of $200 were made. From the evidence before the court there is some doubt that plaintiffs' Exhibit 14 and 15 are in the handwriting of the deceased. Even if conclusively proven to be in the handwriting of Burkett, they are not sufficient to establish that the money changed hands as a loan in view of the other evidence offered to the court. The plaintiffs introduced various bank records which purported to prove that Burkett received the payments on the alleged loan and that Scott had made one such payment. The only proof that Scott had made such payment was a check dated August 29 to D. A. Burkett in the amount of $200. The defendant Scott testified that this was in payment for some survey work done by Burkett. There was no contradictory testimony offered, nor was there any proof offered as to the source of the other two alleged payments.

[2] The question for the court is whether the transaction between the defendant, Scott, and Burkett was a loan or an inter vivos gift.

In 38 C.J.S. Gifts § 6, p. 784, a gift is distinguished from a loan:

> "The question as to whether a transaction having all the other requisites of a gift inter vivos is really a gift or a loan is determined by the intention of the transferor, which must be gathered from all of the facts and circumstances attending the transfer of the property."

This transaction does have all the requisites of a gift inter vivos.

In Whitfield v. Metropolitan Life Ins. Co. (W.D.Ark. 1967), 262 F.Supp. 977, at page 982 the court stated:

> "In order to make a valid gift inter vivos, the basic requirements are (1) the donor must possess mental capacity; (2) must have a donative intent; (3) must deliver the property to the donee or to someone else for the donee; and (4) the donee must accept the gift."

See, also, Swift v. W. B. Worthen Co. (1928), 176 Ark. 585, 3 S.W.2d 316.

The mental capacity of the donor in this case was not questioned. It was obvious that the alleged donor had strong personal feelings toward the defendant, Scott, and did not particularly care for his own family. The property was delivered to Scott and Scott did accept the gift. The intention of the transferor must be determined from the evidence before the court. In the case of Jensen v. Housley (1944), 207 Ark. 742, 182 S.W.2d 758, the fact that the donor had strong affection for the donee was considered in determining the intent of the transferor.

The testator or legator, as designated by plaintiffs, was a man of education and considerable business experience.

He was industrious and continued to work intermittently as a civil engineer or a surveyor even when it was apparent that there was no financial necessity for such exertions. After his wife's death, he was lonely and apparently the only persons who exhibited any special interest in him or in his welfare were Mr. Scott, the defendant, and Mrs. Scott. He found the welcome mat at their door at all times. The evidence reveals that he considered himself really as a member of their family, and was intending to live in their new home in an apartment he specially designed.

The plaintiffs offered no testimony showing or tending to show that Mr. Burkett did not do exactly what he intended to do. There was no coercion, no overreaching, and no undue influence, and this court cannot, in view of all the evidence and circumstances, find other than that the gifts of this money were intended by the donee and were in fact gifts which were duly accepted.

Therefore, judgment is being entered today dismissing the complaint of plaintiffs and adjudging costs against them.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1388.

Ceicel D. Brown and William D. Brown,
Appellants,
v.
Thomas P. Scott,
Appellee.

Appeal from the United States District Court for the Western District of Arkansas.

January 28, 1972.

Before VAN OOSTERHOUT and STEPHENSON, Circuit Judges, and REGISTER, District Judge.

PER CURIAM.

The Judgment dismissing plaintiffs' complaint for recovery of $33,995.91 allegedly loaned by plaintiffs' legator to defendant is affirmed on the basis of Judge Miller's memorandum opinion reported at 326 F.Supp. 332. The facts and controlling Arkansas law are fairly and adequately set out in such opinion.

Plaintiffs' complaint is based upon three checks delivered by plaintiffs' legator, D. A. Burkett, to defendant Scott which are asserted to represent loans made to Scott. Plaintiffs as residuary legatees have by operation of Burkett's will and by assignment of the executor succeeded to all interest of Burkett in this cause of action. Defendant by answer denied that he is in any way indebted to plaintiffs or their legator.

Much of plaintiffs' brief on appeal is devoted to an attack on the sufficiency of defendant's pleadings to permit reception of evidence to support defendant's contention that the checks delivered were intended as gifts, not as loans, and that error was committed in denying plaintiffs' motions to dismiss and for summary judgment. We agree with the trial court that the asserted procedural errors lack merit.

This case was tried to the court without a jury. An essential element of plaintiffs' cause of action is that Burkett at the time he delivered the checks in controversy to the defendant, which checks were cashed by defendant, intended the transaction to be a loan. Evidence was offered by plaintiffs to establish that Burkett intended the transaction to be a loan. Defendant offered evidence to show the checks were intended to be a gift. Burkett by turning over the money to defendant by means of the checks either made a gift or a loan. The category in which the transactions here involved fall was the critical fact issue to be resolved by the court. The court in its opinion properly stated the elements of a gift inter vivos and upon the basis of conflicting evidence found the transactions relied upon by plaintiffs constituted gifts inter vivos—not loans, and that no indebtedness from defendant to Burkett arose out of such transactions.

We are not authorized to review cases de novo upon appeal. The clearly erroneous standard applies to fact findings made by the trial court in cases tried to the court without a jury. Rule 52(a), Fed. R. Civ. P.

Plaintiffs have failed to establish that the court's finding that no loan was made or intended by Burkett in the transactions here pertinent is clearly erroneous.

A careful review of the record satisfies us that the findings of fact made are supported by substantial evidence. Judge Miller points out in his opinion the supporting evidence upon which he relies. As pointed out in the trial court's opinion, the findings of fact made require dismissal upon the basis of the applicable Arkansas law.

The judgment of dismissal is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1388 September Term, 1971

Ceicel D. Brown and William D. Brown,
Appellants,
vs.
Thomas P. Scott,
Appellee.

Appeal from the United States District Court for the Western District of Arkansas.

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 23, 1972